

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

WILLIAM J.R. EMBREY,

Plaintiff,

v.

STATE OF OKLAHOMA, et al.,

Defendants.

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Case No. CIV-13-360-F

REPORT AND RECOMMENDATION

Plaintiff, a federal prisoner appearing pro se and *in forma pauperis*, brings this action alleging a violation of his constitutional rights. United States District Judge Stephen P. Friot has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the following reasons, the undersigned hereby vacates the previous order granting Plaintiff's motion to proceed *in forma pauperis*, **ECF No. 12**, and instead recommends that the motion be **DENIED** under 28 U.S.C. § 1915(g).

By this action, Plaintiff questions the constitutionality of Oklahoma's law prohibiting possession of a firearm by a convicted felon. Complaint, 1. Plaintiff states that:

The State of Oklahoma by and through its Attorney General have divested and or abrogated Plaintiff's Constitutional secured and vested right to possess in his home, legal firearms for lawful home, family, and self-defenses; and have declared that the Constitution and its Second, Fifth, and Fourteenth Amendments do not secure or protect that right.

Id. Plaintiff clarifies that he is not challenging any State or federal “disarmament laws” as being unlawful, but only the application of these laws without a hearing or judicial records “proving that lawful abrogation.” Complaint, 1-2. Plaintiff states that he was born in Missouri in 1939, and was convicted of an unspecified “non-violent” felony in the State of Oklahoma in 1966. Complaint, 5-6. He claims that he was informed by state statute “that if he lawfully exercises his Constitutional secured an vested right” to possess a firearm in his home, the “State will certainly imprison him for a number of years.” Plaintiff does not state whether he has ever attempted to acquire or possess a firearm in the State of Oklahoma. Other than his alleged felony conviction, Plaintiff does not explain what connection he has to the State of Oklahoma. The Court notes that Plaintiff gives his address as the Federal Correctional Institution in Ashland, Kentucky.

In the process of screening the Complaint under 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. §1915A, the undersigned has discovered that Plaintiff has had three or more prior prisoner actions or appeals dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted.¹ Because Plaintiff has had three or more prior dismissals and is not under imminent danger of serious physical injury, his request to proceed *in forma pauperis* should be denied, and the case dismissed without prejudice unless he pays the full filing fee. 28 U.S.C. § 1915(g).

¹ See *e.g. Embrey v. Johnson*, Case No. 01-3515-CV-SOW-P (W.D. Mo. 2001) for a list of qualifying dismissals. Since 2001, Plaintiff has continued to engage in a pattern of attempting to file frivolous actions without prepayment of the filing fee, including several cases raising the same claims contained herein. See *e.g. Embrey v. Smith*, Case No. 6:13-cv-3332-JFM (W.D. Mo. Sept. 9, 2013) (denying leave to appear IFP and dismissing without prejudice under 28 U.S.C. § 1915(g)); *Embrey v. United States*, Case No. 6:11-cv-3265-SOW (W.D. Mo. Oct. 19, 2011) (same).

RECOMMENDATION

In light of the foregoing, it is hereby recommended that Plaintiff's Motion to proceed *In Forma Pauperis*, **ECF No. 2**, be **DENIED** under 28 U.S.C. 1915(g), and that the action be dismissed without prejudice unless the full filing fee is paid within ten days of any order adopting this recommendation. Plaintiff is advised that any objections to this Report and Recommendation must be filed with the Clerk of this Court on or before **October 4, 2013**, in accordance with 28 U.S.C § 636 and Federal Rule of Civil Procedure 72. Plaintiff is further advised that failure to make timely objection to this recommendation constitutes a waiver of appellate review of both factual and legal questions addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

In light of this recommendation, the order granting leave to proceed *in forma pauperis*, **ECF No. 12**, and the order to agency having custody of Plaintiff for payment of the filing fee, **ECF No. 14**, are hereby **VACATED**. The Clerk of Court is hereby directed to send a copy of this Report and Recommendation to the Federal Correctional Institution in Ashland, Kentucky.

This Report and Recommendation **DOES NOT** terminate the referral by the District Judge in this matter.

ENTERED on September 17, 2013.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE